

THIS DECISION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Paper No. 10  
JQ  
Mailed: 3/13/03

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Gates-Mills, Inc.

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Serial No. 76/106,266

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Albert L. Schmeiser of Schmeiser, Olsen & Watts for  
applicant.

Andrea D. Saunders, Trademark Examining Attorney, Law  
Office 108 (David Shallant, Managing Attorney).

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Before Quinn, Hohein and Bottorff, Administrative Trademark  
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Gates-Mills, Inc. to  
register the mark CAMO-TEK for "waterproof general utility  
bag for hunting."<sup>1</sup>

The Trademark Examining Attorney refused registration  
on two bases, namely (i) applicant's failure to comply with

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<sup>1</sup> Application Serial No. 76/106,266, filed August 9, 2000,  
alleging a date of first use anywhere and a date of first use in  
commerce of July 31, 2000. An amendment to the identification of  
goods will be considered in this decision (see discussion,  
infra).

a requirement to amend the identification of goods to more specifically identify them, and (ii) under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered mark TEK for "briefcases, pocketbooks, handbags, purses and luggage, namely, traveling bags, tote bags, carry-on bags, garment bags, overnight bags, and shoulder bags"<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

#### **Identification of Goods**

The Examining Attorney maintains in her final refusal that the identification of goods is unacceptable because, as presently worded, it identifies goods in multiple classes. According to the Examining Attorney, the identification would include "hunting boot bags" in International Class 25, and "sportsman's hunting bags" or "hunter's game bags" in International Class 18. Attached to the final refusal is an electronic excerpt from the Trademark ID Manual setting forth these three identifications. The Examining Attorney stated that

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<sup>2</sup> Registration No. 2,049,498, issued April 1, 1997.

"applicant is advised to peruse the suggestions for an acceptable amendment to the identification of goods."

Applicant, in its brief (p. 12), contends that the present identification is definite, but goes on to indicate, however, that it "is more than willing to accept the Examiner's proposed description from an approved list, namely, 'sportsman's hunting bags.'"

The Examining Attorney, in her brief, somewhat surprisingly did not make any direct response to applicant's offer, but rather simply maintained that "applicant did not amend the identification of goods."

Applicant, in its reply brief, reiterated that "applicant's description is sufficient, though in the alternative applicant would accept the Examiner's suggestion of "sportsman's hunting bags."

To the extent that the present identification may include goods in at least two different classes, we are inclined to accept applicant's offer to amend the identification of goods to one that is specifically set forth in the Trademark ID Manual, and that is acceptable to the Examining Attorney per her suggestion.

Accordingly, the proposed amendment of the identification of goods to "sportsman's hunting bags" is approved and entered. This identification, therefore, is

the one we will use in our consideration of the likelihood of confusion issue.

This portion of the appeal is dismissed as moot.

**Likelihood of Confusion**

Applicant contends that its mark CAMO-TEK and registrant's mark TEK have different commercial impressions, with applicant's having "the suggestion of a hunting or outdoor item with an aspect of concealment" while registrant's makes no such suggestion. Applicant also argues that the involved marks are weak and that registrant's mark is entitled to a narrow scope of protection. In support of its argument, applicant submitted third-party registrations of marks which include the term "tek" or its phonetic equivalent "tech."

As to the goods, applicant argues that they travel in different channels of trade to different classes of purchasers. In this connection, applicant asserts that registrant's goods comprise a standard line of luggage whereas applicant's goods are directed specifically to the sporting or hunting market.

The Examining Attorney maintains that applicant's and registrant's marks are similar in sound, appearance and meaning. The Examining Attorney asserts that applicant has adopted the entirety of registrant's mark TEK and merely

added the descriptive and subordinate term "camo" to it to form the mark CAMO-TEK. In support of this position, the Examining Attorney submitted a dictionary listing of "camo." The Examining Attorney goes on to argue that the goods are closely related, pointing to the Internet evidence of certain websites offering for sale both travel bags and bags for hunters. According to the Examining Attorney, "[b]y adding the term CAMO to the registered mark, it appears that the goods are merely an outdoor and/or camouflaged version of the registrant's pre-existing line of goods." (brief, p. 3).

Before turning to the merits of the appeal, we direct our attention to an evidentiary matter bearing on applicant's argument that the cited mark is entitled to a narrow scope of protection. During the prosecution of its application (August 24, 2001 response), applicant made reference to its search of the PTO's database which, according to applicant, revealed many third-party registrations of TEK and TECH marks. Applicant specifically referred to two of the registrations, supplying the registration number, mark and goods, but applicant failed to submit copies of the registrations. The Examining Attorney, in the final refusal, considered these two registrations as if properly made of record.

Attached to applicant's appeal brief as "Exhibit A" are copies of ten third-party registrations which include TEK or TECH as part of the marks for luggage and various bags. The registrations were retrieved from the Trademark Electronic Search System (TESS). Two of the registrations, namely Registration Nos. 1,946,888 and 2,015,930, were the ones considered earlier by the Examining Attorney. Applicant also submitted a copy of a registration ("Exhibit B"), of which it claims ownership, for the mark CAMO-TEK for gloves. In its reply brief, applicant also makes reference to a Google search of the term "tek," contending that there are thousands of uses of "TEK" on the Internet, and indicating that applicant "saves whole forests by not including an Exhibit on point."

The Examining Attorney has objected to the registration evidence attached to the appeal brief, except for the two registrations earlier made of record. The basis of the objection is the untimeliness of the submission, citing Trademark Rule 2.142(d).

Applicant argues that the registrations are matters of public record and that the Board has discretion to consider such evidence.

The Examining Attorney's objection is well taken inasmuch as eight of the third-party registrations and its

own registration were untimely submitted. Trademark Rule 2.142(d). Further, such registrations are not proper subject matter for judicial notice. *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290 (TTAB 1986); and *Cities Service Co. v. WMF of America, Inc.*, 199 USPQ 493 (TTAB 1978).

Accordingly, of the registration evidence, only Registration Nos. 1,946,888 and 2,015,930 have been considered in reaching our decision.

We now turn to focus our attention on the merits. Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In *re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

As shown by the dictionary evidence, the term "camo" means "camouflage fabric or a garment made of it." The American Heritage Dictionary of the English Language (3<sup>rd</sup> ed. 1992). The term "CAMO," as applied to applicant's

goods, is at least suggestive, if not merely descriptive of sportsman's hunting bags that would be made of camouflage fabric. Applicant's mark CAMO-TEK incorporates the cited mark TEK in its entirety, and merely adds the subordinate term "CAMO" to it. A subsequent user may not appropriate the mark of another and by adding subordinate matter thereto avoid a likelihood of confusion. The Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419 (CCPA 1977); In re Equitable Bancorporation, 229 USPQ 709 (TTAB 1986); In re Denisi, 225 USPQ 624 (TTAB 1985); Henry I. Siegel Co., Inc. v. A & F Originals, Inc., 225 USPQ 626 (TTAB 1985); Gumpert Co., Inc. v. ITT Continental Baking Co., 191 USPQ 409 (TTAB 1976); and Alberto-Culver Co. v. Helene Curtis Industries, Inc., 167 USPQ 365 (TTAB 1970).

In urging that the marks are not similar, applicant contends that the cited mark is weak. Applicant asserts that the term "TEK" and its phonetic equivalent "TECH" are suggestive and in widespread use. In assessing applicant's argument, we have taken into account the two third-party registrations (TRIP-TEK for luggage and SHER-TEK for bags for carrying sports equipment) that are of record.

To the extent that applicant is arguing that the third-party registrations, like a dictionary definition, show the suggestive meaning of "TEK," we have considered



the registrations. See: *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976) [although third-party registrations are entitled to little weight on the question of likelihood of confusion where there is no evidence of actual use, they may be given some weight to show the meaning of a mark in the same way that dictionaries are used].

To the extent that the registrations are relied upon to show widespread use, they are not probative in that regard. Under du Pont, "[t]he number and nature of similar marks in use on similar goods" is a factor that must be considered in determining likelihood of confusion. In re *E.I. du Pont de Nemours & Co.*, supra at 567. Third-party registrations, however, are given little weight when evaluating likelihood of confusion. More significantly, because third-party registrations are not evidence of actual use of the marks which are the subjects thereof, such evidence may not be given any weight in assessing the strength of a mark in the marketplace. *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992), citing *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ["The existence of [third-party] registrations is not evidence of what happens in the market place or that

customers are familiar with them...."]. See: Smith Bros. Mfg. Co. v. Stone Mfg. Co., 476 F.2d 1004, 177 USPQ 42, 463 (CCPA 1973) ["in the absence of any evidence showing the extent of use of any of such marks or whether any of them are now in use, they [the third-party registrations] provide no basis for saying that the marks so registered have had, or may have, any effect at all on the public mind so as to have a bearing on likelihood of confusion"].

After considering applicant's arguments and evidence relating thereto, we find that the term "TEK" in applicant's mark is somewhat suggestive of "technology" as in "camouflage technology." The term "TEK" per se, as in the case of the cited mark, essentially is arbitrary as applied to luggage. The registrations, therefore, do not compel a different result in this case.<sup>3</sup>

Accordingly, when considered in their entirety, we find that the marks at issue are similar in sound, appearance, connotation and commercial impression. If applied to similar goods, such marks would be likely to confuse purchasers in the marketplace.

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<sup>3</sup> Even if the additional registrations were considered, they would not be persuasive of a different result for the same reasons expressed above.

Turning next to a comparison the goods, we start with the premise that they need not be identical or even competitive to support a holding of likelihood of confusion. It is sufficient that the goods are related or that conditions surrounding their marketing are such that they are encountered by the same persons who, because of the relatedness of the goods and the similarities between the marks, would believe mistakenly that the goods originate from or are in some way associated with the same producer. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

In the present case, applicant's goods are identified as "sportsman's hunting bags" while registrant's goods include "luggage, namely, traveling bags, tote bags, carry-on bags, garment bags, overnight bags, and shoulder bags." Although the goods are specifically different, the goods are "bags" and are commercially related. Applicant's identification is not limited to bags sold only in sporting goods stores. We must deem the goods to move through all appropriate trade channels, and to all relevant purchasers. In re William Hodges & Co., Inc., 190 USPQ 47 (TTAB 1976). These channels would include all places where travel bags and sportsman's hunting bags are sold, including department

stores and mass merchandisers; the consumers would include the public at large.

In stating that the goods are commercially related, we have considered the excerpts from five websites retrieved from the Internet. In each instance, the same manufacturer sells both travel bags as well as bags for hunters; and in some instances, the respective goods would appear to be sold under the same mark. Contrary to applicant's arguments, the evidence shows that the types of goods sold by applicant and registrant travel in the same channels of trade to the same classes of consumers.

Simply put, the distinctions in trade channels argued by applicant are not reflected in the respective identifications of goods and, further, are not borne out by the record.

We find that consumers familiar with luggage sold under the mark TEK would be likely to believe, upon encountering applicant's mark CAMO-TEK for sportsman's hunting bags, that applicant's mark identifies a line of camouflage hunting bags produced by registrant.

Lastly, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper

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Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The appeal relative to the identification of goods is dismissed as moot. The Section 2(d) likelihood of confusion refusal to register is affirmed.